STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 29, 2004
v	No. 237036 Wayne Circuit Court
KEVIN M. ROBINSON, Defendant-Appellant.	LC No. 00-009498-02

Before: Murphy, P.J., and Cooper and C. L. Levin[*], JJ.

PER CURIAM.

The defendant, Kevin M. Robinson, appeals his conviction, as an aider and abettor, of second-degree murder.

A

The circuit judge, who was the trier of fact, considered the three mental elements of second-degree (common law) murder, intent to kill, intent to inflict great bodily harm, and wanton and willful conduct likely to cause death,[1] and found Robinson guilty of second-degree murder "on the prong of great bodily harm only." (Emphasis added.)

Injuries inflicted during an assault by Samuel Pannell and Robinson of the victim were not the cause of death. A gunshot fired by Pannell to the victim's skull was the cause of death. A jury found Pannell guilty of first-degree murder.[2]

[*] Former Supreme Court justice, sitting on the Court of Appeals by assignment.

[1] "We hold that in order to convict a defendant of murder, as that term is defined by Michigan law, it must be shown that he acted with intent to kill or to inflict great bodily harm or with a wanton and willful disregard of the likelihood that the natural tendency of his behavior is to cause death or great bodily harm." *People v Aaron*, 408 Mich 672, 733, 299 NW2d 304 (1980).

[2] Robinson and Pannell had a joint trial.

The question presented is whether Robinson could properly be convicted of second-degree murder, under the intent to inflict great bodily harm prong, as an aider and abettor[3] of Pannell, on the factual findings made by the judge.

We hold that Robinson could not be properly convicted of second degree murder on those factual findings, and reverse the conviction of second-degree murder, and reduce the charge of which Robinson was convicted to assault with intent to inflict great bodily harm less than murder (MCL 750.85), and remand for resentencing on that reduced charge.

B

The elements of aiding and abetting a murder are set forth in the margin.[4]

Robinson's conviction of second-degree murder is reversed because

- the judge found that of the three mental elements of second degree murder, Robinson possessed only the intent to inflict great bodily harm;

- the cause of death was not injuries inflicted during the assault with intent to inflict great bodily harm: the judge found that death was caused by a gunshot to the victim's skull after Robinson left the scene;

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[3] The judge did not find that Robinson "aided and abetted" Pannell in firing the gunshot that killed the victim.

[4] The standard of criminal jury instruction on aiding and abetting, CJI 2d 8.1, is set forth in footnote 14 *infra*.

The standard criminal jury instruction on aiding and abetting where the issue is whether a separate crime is within the scope of a common unlawful enterprise, CJI 2d 8.3, is set forth in footnote 13 *infra*.

The standard criminal jury instruction on second degree murder, CJI 2d 16.5, is as follows:

> (1) [The defendant is charged with the crime of [You may also consider the lesser charge of] second-degree murder. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> (2) First, the defendant caused the death of [*named deceased*], that is, that [*name deceased*] died as a result of [*state alleged act causing death*].
>
> (3) Second, that the defendant had one of these three states of mind: [he/she] intended to kill, or [he/she] intended to do great bodily harm to [*named deceased*], or [he/she] knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of [his/her]actions.
>
> (4) [Third, that the killing was not justified, excused, or done under circumstances that reduce it to a lesser crime.]

- the judge found that shooting the victim was beyond the scope of what Robinson "agreed" and "understood" he was at the scene for, or "had intended to have happen;"

- the acts Robinson committed, that the judge found facilitated the killing,[5] all occurred pursuant to the plan to inflict great bodily harm, and were all committed, the judge also found, before Pannell pulled the gun, and decided he was going to kill the victim;

- the judge found that as Pannell got the upper hand, Robinson said "back off" "stop, stop it, he's had enough," "turned around and tried to leave," "and then turned around and walked out," and "the evidence actually showed that he left right before Mr. Pannell pulled the gun", and "decided he was going to shoot and kill the person that you [Robinson] agreed and you understood you were only there to beat up," and "stayed and shot" him;

- the judge did not find a necessary element of aider and abettor liability, that the acts committed by Robinson (see n 5), pursuant to the plan to inflict great bodily harm, were committed by him with the intent to aid Pannell in killing the victim, and all his specific factual findings are to the contrary. Nor did the judge find that Robinson provided aid sharing or aware of Pannell's intent to kill the victim (see n 17 *infra*).

C

A necessary element of murder is missing, because the trier of fact found that Robinson intended to inflict great bodily harm only, and injuries inflicted with that intent were not the cause of death.

There is also missing an element of aider and abettor liability, the failure of the judge to find that when Robinson committed acts pursuant to the plan to inflict great bodily harm only, Robinson intended thereby to assist Pannell in killing the victim, sharing or aware of Pannell's intent to kill.

On the issue of aider and abettor liability, the judge's findings that Robinson intended to inflict great bodily harm only, and that shooting the victim was beyond what Robinson "agreed" and "understood" he was there for, or "had intended to have happen", were tantamount to a finding that when Robinson committed acts pursuant to the plan to inflict great bodily harm only, he did not intend thereby to aid Pannell in killing the victim.

The judge's finding of guilt under the great bodily harm prong only, constituted an implicit, and possibly an express, rejection by the judge of intent to kill (first prong)[6] or of

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[5] Driving Pannell to the scene, striking the victim, resulting in the victim falling to the floor.

[6] The judge said:

> I have come to the conclusion that the prosecution has proven the count of Second Degree Murder on the prong of <u>great bodily harm only</u>. <u>I do not find that Mr. Robinson went over there with the intent to kill clearly, and I want to make</u>

(continued…)

wanton and willful conduct (third prong), and amounted, as a matter of law, to acquittal of Robinson of the more serious charge of aiding and abetting an intentional killing,[7] which requires a finding not merely that Robinson aided Pannell, but a finding, negated by the implicit acquittal of the first and third prongs - and also by the specific factual findings set forth above - that Robinson intended to so aid Pannell in killing the victim either sharing Pannell's intent to kill or knowing of Pannell's intent to kill.

I

There was sufficient evidence to support a conviction of second-degree murder. Another finder of fact, a jury or another judge, might have assessed Robinson's credibility and the other evidence differently.

This judge, however, found as follows:

A

The judge began the statement of his findings saying that he believed Robinson when he said that he was sleeping at his girlfriend's aunt's home, and, when he awakened, he went downstairs. Robinson's girlfriend testified that Pannell, who also was in the house, had calmed down before Robinson came downstairs. She said that Pannell's statements made downstairs, before Robinson awakened, concerning the victim, Bernard Thomas, that he, Pannell, was going to "F**k him up, I'm going to kill him," "was said and done and over with" before Robinson came downstairs.

Robinson testified that when he came downstairs "all you could hear through the house was Sam saying, 'I'm going to f**k him up.'"

The judge said he did not believe Pannell's effort to shift responsibility to Robinson by "characteriz[ing] this as some sort of drug debt on behalf of Mr. Robinson."

B

Robinson and Pannell left the house in an automobile. In a statement to the police, Robinson said, after stopping at Robinson's mother's home and then a liquor store, "I was driving and he [Pannell] said he'd show me where this guy lives." Robinson acknowledged that "it was understood between us that we were going to f**k him up."

(…continued)

that perfectly clear on the record. Nor do I believe that Mr. Robinson went over there with the reckless disregard prong.

[7] The prosecutor sought to charge Robinson as a principal, as the statute contemplates (MCL 767.39), with first-degree murder, the same charge lodged against Pannell. The magistrate, however, bound Robinson over on second-degree murder. The prosecutor sought to prove intent to kill, but the judge found intent to inflict great bodily harm only.

Pannell knocked on the door of Thomas' house. When Thomas opened the door, Robinson acknowledged, in his statement to the police, "I back-handed him with my right hand in the face. He stumbled back." Robinson "back-handed him again in the neck. The guy was falling to the floor and Sam punched him twice with his fist." "Then Sam started kicking the guy on the floor, and I [Robinson] said, 'that's enough,' but Sam kept kicking him."

The judge said, "Kevin Robinson is the one who asked where the guy lives because he didn't know and then drove over there". "It was Kevin Robinson who initiated the attack." "He's the one that's giving the orders". "That's enough, but Sam kept kicking him."

The judge quoted further from Robinson's statement to the police, that Robinson said that he "left Sam in the house and went outside to my car to leave. As I was getting in my car, I heard one gunshot from the house." In response to the question whether he saw Pannell with a gun, Robinson told the police, "I'm not saying he didn't have one but I didn't see one."

C

The judge then stated his conclusion:

> I have come to the conclusion that the prosecution has proven the count of Second Degree Murder on the prong of great bodily harm only. I do not find that Mr. Robinson went over there with the intent to kill clearly, and I want to make that perfectly clear on the record. Nor do I believe that Mr. Robinson went over there with the reckless disregard prong. (Emphasis added.)
>
> I do believe that based upon his own admissions, that it was understood that they were going over there to fuck him up, which is the words taken directly out of his statement. And consequently, I found the defendant guilty yesterday.[8]
>
> And I've indicated on the verdict form that – and I checked the verdict form. It was not guilty. I put guilty under the GBH prong or guilty of the lesser-included offense of Great Bodily Harm Less Than Murder or guilty of the lesser offense of Aggravated Assault, and I checked guilty of Second-Degree Murder under GBH.[9]

[8] The judge said he had signed the "verdict form" with his decision, "guilty, GBH", on the day before he announced his decision and before the jury came in with its verdict. The verdict form also set forth not guilty and the lesser offenses of assault with intent to inflict great bodily harm less than murder and aggravated assault.

[9] Later, the judge said again:

> as a matter of law, the court finds the defendant guilty of Second Degree Murder under the GBH prong only. (Emphasis added.)

D

The judge added, after Robinson's lawyer made a further argument:

I understand clearly the fact that Pannell was the one who had the gun, even based upon the description of – although he denied it and was impeached – the one eyewitness. The – those are all factors – and that he left and then it was the gunshot. But it's all along the theory of, you know, he actually had to ask directions. I mean he was driving the car. He didn't have to go there.

* * *

But the other thing is that he [Robinson] was the one that struck Thomas first and got the ball rolling and got him down on the ground.

* * *

But it was – it's more along the lines of in for a penny, in for a pound. He [Robinson] got the ball rolling, he initiated it. He got the guy down from the ground and then it got beyond – I understand your argument that it got beyond what his concept of his thought was and that he then left. But the gentleman did die and Pannell did it according to, you know, again, inferences that your client made. I mean I've made inferences, but it's also inferences that your client has made as to – in his own statement that it had to be Sam Pannell who killed him because they were the only two in the house. I've drawn inferences, your client has drawn inferences, but it was your client that struck Bernard Thomas knocking him to the ground that enabled Pannell to get the upper hand. Then when Pannell gets the upper hand, your client says back off and – and then walks out. And then Pannell, based upon the inferences that your client has made, he hears the shot and they're the only two in the house. (Emphasis added.)

* * *

And Bernard Thomas winds up dead and Pannell walks out. So it's reasonable for your client to assume that Pannell was the one who shot him, shot Bernard Thomas. So under that fact that they were there, okay, and they were kicking and he got to that point is where – and had the death been from the GBH, I understand your argument. And that is why I also think that the prosecutor did not charge your client with the Felony Firearm count. They only charge Pannell because that would have been problematic for them.

But at the same time, for those reasons that I've articulated already, I believe that it is sufficient to support a finding of guilty under GBH prong of Second Degree Murder, and consequently, that is what I have found.

E

At sentencing, the judge said that Robison's counsel had acknowledged that Robinson

"went there with an intent to cause some harm, all right, to beat him up, you know, to hurt him. All right. Unfortunately, Mr. Pannell who you [Robinson] were with decided that he was going to shoot and kill the person that you agreed and you understood you were only there to beat up. (Emphasis added.)

The prong for Second Degree Murder is assault with intent to cause great bodily harm. If you go over there with that intent and someone happens to die, then you can be found guilty of Second Degree Murder, which is what I did. I – and Mr. Brady [Robinson's lawyer] is correct that there was some reluctance on my part on doing that because I understood that clearly based upon his cross, that this was beyond the scope of what you had intended to have happen, and, in fact, the evidence demonstrated that you turned around and tried to leave – (Emphasis added.)

Defendant Pannell: [sic, actually Robinson]: Yes.

The Court - at that point. Consequent – but going there with the intent to cause great bodily harm and having someone die as a result of at least part of your actions was primarily the reason why I found you guilty of Second Degree Murder. (Emphasis added.)

The Court: Mr. Pannell [sic, actually Robinson] was the one that I found guilty of Second Degree Murder because he went through the door. He was the driver and he hit the – your son who ultimately was shot by Mr. Pannell, and he knocked him to the floor which enabled Mr. Pannell to get on top of your son and basically shoot and kill your son. His responsibility a far as – he was actively involved in the homicide but he wasn't the shooter. (Emphasis added.)

* * *

And because – but because of the fact that he went over there with the intent to beat him up, I found him guilty of Second Degree Murder and that's why I sentenced – or found him guilty of that. (Emphasis added.)

But I'm going to sentence him appropriate to his involvement in that. He was not the shooter. He was one who came along and was involved in the assault, but the evidence actually showed that he left right before Mr. Pannell pulled the gun and shot your son. He said – he actually – this defendant said to Mr. Pannell, you know, basically stop, stop it, he's had enough, all right, and then turned around and walked out. But then Mr. Pannell stayed and the evidence showed that he then shot – Pannell, not Mr. Robinson who's before the court today, stayed and shot your son. Mr. Pannell came over [to the girlfriend's aunt's home] a few minutes after, after he had shot and killed your son. (Emphasis added.)

F

In sum, the judge found that Robinson

- assaulted the victim with the intent to inflict great bodily harm only; and
- was actively involved in the homicide; and
- aided Pannell in killing the victim by getting the ball rolling, driving Pannell to the victim's home and striking the victim and knocking him to the floor which enabled Pannell to get the upper-hand, and on top of the victim, and shoot and kill him; and
- did not go over to the victim's home with the intent to kill, nor did he go over there "with the reckless disregard prong"; and
- said "back off," as Pannell got the upper hand, "and then walked out"; and said "stop, stop it," he's had enough," "turned around and tried to leave," "and then turned around and walked out," and "the evidence actually showed that [Robinson] left right before Mr. Pannell pulled the gun," and Pannell "decided he was going to shoot and kill" the victim, and stayed and shot him; and
- "agreed" and "understood" he was "only there to beat up," and the shooting "was beyond the scope of what [Robinson] had intended to have happen"; and
- was, nevertheless, guilty of second-degree murder under the great bodily harm prong only.

II

The judge's factual findings that

- Robinson "agreed" and "understood" he was "only there to beat up" the victim, and
- the shooting "was beyond the scope of what [Robinson] had intended to have happen;" and
- Robinson intended to inflict great bodily harm only,

require that his conviction of second-degree murder, as an aider and abettor, be reversed.

A

Principles of accomplice liability are set forth in Justice Campbell's opinion for the Michigan Supreme Court in *People v Knapp*, 26 Mich 112 (1872). Knapp and others had been charged with the rape/murder of a young woman. Knapp was convicted of manslaughter. The woman's death "was caused by a broken leg, the result of accident, or else of her being thrown or

pushed from [the window of the upper story of a building belonging to Knapp] by some one or more persons."

The Court said that because there was no testimony that could justify the conclusion that Knapp himself caused her ejection from the window of the building, in which he and several other young men had sexual intercourse with the victim, "he must have been convicted on the ground that he was responsible for the conduct of those who did."

The Court ruled that the verdict "amounts in law to an acquittal of any more serious charge than manslaughter, and therefore is a denial of the charge that her death was a result of any other felony." (Emphasis added.)[10]

The conviction of manslaughter was set aside and a new trial was granted because the trial judge had erred in instructing the jurors that if they concluded that the defendants combined to induce the woman to go to the shop for purposes of prostitution, and, in order to avoid arrest, threw her out of the window, resulting in injuries that caused her death, it would be manslaughter because they were engaged "in an act against public morals, and unlawful." The judge had refused to charge that if throwing her out of the window was done without the concurrence of Knapp, or if one of the young men, without the knowledge or consent of the others, threw her out of the window, then none but those actually engaged in the act are liable for the consequences.

The Court said, "It is undoubtedly possible for parties to combine in order to make an escape effectual, but no such agreement can lawfully be inferred from a combination to do the original wrong. There can be no criminal responsibility for any thing not fairly within the common enterprise, and which might be expected to happen if occasion should arise for anyone to do it."[11] (Emphasis added.)

B

The principle stated in *Knapp* is also found in a long recognized textbook as follows:

> It is not always enough to show that he [the alleged accomplice] counseled, commanded, or consented to some other crime. If several persons combine or conspire to commit one crime, and one of them goes outside of the common purpose and commits another crime, which is not a natural or probable

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[10] Similarly, see *People v Gessinger,* 238 Mich 625, 628 (1927) and cases there cited. See also *People v Garcia* (after remand) 203 Mich App 420, 424 (1994), affirmed by equal division 448 Mich 442 (1985), rehearing and certiorari denied, discussing the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution and "[t]he seminal case involving retrial after an implicit acquittal" (Riley, J.) 448 Mich 448, *Green v United States,* 355 US 184, 191 (78 S Ct 221; 2 L Ed 2d 199 (1957).

[11] Similarly, see *People v Foley* 59 Mich 553, 26 NW 699 (1886), *People v Belton,* 160 Mich 416; 125 NW 386 (1910); *People v Koharski*, 177 Mich 194; 142 NW 1097 (1913); *People v Poplar,* 20 Mich App 132, 137-139 (1960).

consequence of carrying out the common purpose, the others are not responsible. (Emphasis added.)

If A command or counsel B to commit a felony of one kind, and B commits a felony of another kind, A is not accessory; as, if A commanded B to steal a plate, and B commits burglary to steal a plate, A is accessory to the theft, but not to the burglary.

If several combine to steal from a safe in a building, and one of them, in the absence of the others, robs a watchman in the building, the others are not accessories to the robbery. Clark and Marshall, Crimes (7th ed), § 8.09, pp 534-535.

The Michigan Supreme Court observed in *Aaron*:

"In situations involving the vicarious liability of co-felons, the individual liability of each felon must be shown. It is fundamentally unfair and in violation of basic principles of individual criminal culpability to hold one felon liable for the unforeseen and unagreed-to results of another felon." *People v Aaron*, 409 Mich 672, 731 (1980).[12]

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[12] In *People v Kelley*, 423 Mich 261, 279-280; 378 NW2d 365 (1985), the Court adverted to this passage in *Aaron*, and observed:

"[t]his concern [for co-felons who *** became involved in an unforeseen and unagreed-to murder"] is not implicated by an aiding and abetting standard which requires a finding that the co-felon acted with malice,"

This case shows that the concern about holding one felon liable for the unforeseen and unagreed-to actions of another felon (*Knapp)* is implicated by an aiding and abetting standard that requires a finding only that the "co-felon acted with malice" without regard to whether injuries inflicted with the intent to inflict great bodily harm only, the particular "malice" found by the judge in this case, was the cause of death.

The term "malice", if applied in the context of this case, would camouflage which of the three alternative mental states Robinson was found by the judge to have intended and possessed, and, as stated in *LaFave* and *Scott* and quoted with approval by the Court in *Aaron*, would be "misleading". *People v Aaron*, *supra*, p 714.

A physical assault with intent to inflict great bodily harm that does not result in injuries that cause death does not become "malice," within the meaning and for the purposes of *Aaron*, because death did not result from injuries inflicted during the beating.

It is the intent to kill (first prong) coupled with an act to effectuate that intent resulting in death from that act, or, alternatively, intent to inflict great bodily harm (second prong) coupled with an act to effectuate that intent resulting in death from injuries caused by that act, or, alternatively, wanton and willful conduct (third prong) resulting in death from that conduct, that transforms a homicidal daydream of intent to kill, or even an actual shooting or an actual assault, from a daydream or shooting or an

(continued…)

The judge found that Robinson "agreed" and "understood" he was at the scene of the assault and shooting "only to beat up" the victim. The shooting of the victim, found by the judge to have been "beyond the scope of what [Robinson] had ["agreed" and "understood" and] intended to have happen," and to have been "unagreed - to" (*Aaron, supra*), was not –because of those factual findings by this judge -- "fairly within the common enterprise, and which might be expected to happen if occasion should arise for anyone to do it." (*Knapp, supra*), and thus "there can be no criminal responsibility" (*Knapp, supra*) on the part of Robinson therefore.[13]

III

The circuit judge's findings that Robinson was "actively involved in the homicide," and aided Pannell in killing the victim by getting the ball rolling, driving Pannell to the victim's home, striking the victim and knocking him to the floor, which the judge said enabled Pannell to get on top of the victim and shoot and kill him, are entirely consistent with the judge's findings that Robinson intended to inflict great bodily harm only, and that the shooting was beyond the scope of what Robinson has "agreed" and "understood" and "had intended to have happen."

A

Although the judge found that Robinson did in fact aid Pannell, it is not sufficient, as stated by LaFave and Scott, that the alleged accomplice "intentionally engaged in acts which, as it turned out, did give" aid. (Emphasis added.) The alleged accomplice "must intend that his acts have the effect" (emphasis added) of aiding.

> Under the usual requirement that the accomplice must intentionally assist or encourage, it is not sufficient that he intentionally engaged in acts which, as it turned out, did give assistance or encouragement to the principal. Rather, the accomplice must intend that his acts have the effect of assisting or encouraging

(…continued)

assault, into murder.

[13] The standard jury instruction (CJI 2d 8.3) where the issue is whether a separate crime is within the scope of a common unlawful enterprise is based on *Knapp*.

> (1) The defendant says that [he/she] is not guilty of [state charged offense] because [he/she] did not intend to help anyone commit that offense.
>
> (2) It is not sufficient for the prosecutor just to prove that the defendant intended to help another in the common unlawful activity of [state common criminal enterprise]. It is necessary that the prosecutor prove beyond a reasonably doubt that the defendant intended to help someone else commit the charged offense of [state charged offense].
>
> (3) In determining whether the defendant intended to help someone else commit the charged offense of [state charged offense], you may consider whether that offense was fairly within the common unlawful activity of [state common criminal enterprise], that is, whether the defendant might have expected the charged offense to happen as part of that activity. There can be no criminal liability for any crime not fairly within the common unlawful activity.

another. For example, assume that A shoots and kills B while C was standing by shouting and gesturing. Is it sufficient, for purposes of accomplice liability to the crime of murder to show that A took C's words and actions to be a manifestation of encouragement, if in fact C was attempting to dissuade A from killing B? Quite obviously not. Thus, even if knowledge of the actor's intent (as opposed to sharing that intent) is otherwise sufficient, the accomplice must have intended to give the aid or encouragement. LaFave and Scott, Criminal Law 2d Ed, Section 6.7(c), page 580. (Emphasis added.)

B

The principle that the accomplice must have intended to assist, aid or encourage the commission of the separate or other crime is embodied in the Michigan standard criminal jury instruction:

> (2) Anyone who intentionally assists someone else in committing a crime is as guilty as the person who directly commits it and can be convicted of that crime as an aider and abettor. CJI2d 8.1, Aiding and Abetting.[14] (Emphasis added.)

C

Suppose two persons are walking to the bank, and one asks the other to carry his briefcase. And, after they arrive at the bank, the owner of the brief case opens it and holds up the

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[14] The standard jury instruction (CJI 2d 8.1) on aiding and abetting, in its entirety, is as follows:

> (1) In this case, the defendant is charged with committing ____ or intentionally assisting someone else in committing it.
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> (2) Anyone who intentionally assists someone else in committing a crime is as guilty as the person who directly commits it and can be convicted of that crime as an aider and abettor.
>
> (3) To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> > (a) First, that the alleged crime was actually committed, either by the defendant or someone else. [It does not matter whether anyone else has been convicted of the crime.]
> >
> > (b) Second, that before or during the crime, the defendant did something to assist in the commission of the crime.
> >
> > (c) Third, the defendant must have intended the commission of the crime alleged or must have known that the other person intended its commission at the time of giving the assistance.

Before *Kelley* was decided, subparagraph (c) read:

> (c) Third, that when the defendant gave [his/her] assistance [he/she] intended to help someone else commit the crime.

bank. His friend no doubt provided aid and assistance in holding up the bank, by accompanying the thief and carrying the briefcase, but is not subject to liability as an aider and abettor unless he provided the assistance with the intention of so assisting the owner of the briefcase in holding up the bank, while either sharing or aware of his criminal intent.

If the additional or other offense committed by Pannell had been theft, stealing the victim's watch rather than killing him, it would be clear that theft is an additional or other offense and that a judge's finding that Robinson intended to inflict great bodily harm only would not support a conviction for a theft offense even if the judge had found, similarly, that Robinson had facilitated commission of the theft offense by getting the ball rolling, knocking the victim to the floor, enabling Pannell to get the upper hand. See *People v Foley*, 59 Mich 553, 556 (1998) where the Court reversed a conviction for robbery because of instructional error. There was a brutal assault by three persons of the complainant during which his vest was torn off and a pocket book containing money taken therefrom. The Court said:

> The particular violence of tearing off the vest, while unquestionably within the responsibility of all the assailants, cannot in law be declared to have been within their specific intent, although possibly the jury might have so found as a fact. But when it is said by the court that whoever did it made no difference and at the same time the jury were told to consider with what particular intent it was done – whether for assault or robbery – they were practically told that men who combine for an assault are liable for any felony committed by one of them, whether participants in the actual felonious design or not, which is not sound law; *People v Knapp*, 26 Mich 112; *Nye v People*, 35 Mich 16. (Emphasis added.)
>
> It was in this condition of the case especially injurious to say to the jury, in effect, that from the act that the vest was torn off something more must have been intended than a mere assault. This was, under the circumstances, substantially telling them that there must have been a design to rob, for no other possible alternative appeared. It is going beyond the province of the court, to suggest, how far any extent of violence indicates an intent to do more than commit violence. It is not impossible, and experience shows is not very remarkable, for ruffians to do any kind of harm from wanton brutality, without any desire of gain, or of anything more than the gratification of their love of mischief. And while these young villains deserve no consideration, they should nevertheless not be convicted of robbery unless robbery was within their common purpose.

If the victim had been Pannell's former wife or girlfriend, and Robinson had accompanied Pannell to the victim's home to beat her up, and, instead of killing her, as he did the victim here, Pannell had raped her, it would be apparent that rape is an additional or other offense and that a judge's findings that Robinson intended to inflict great bodily harm only, and that the rape was beyond the scope of what Robinson "agreed" and "understood" ("he was there only to beat up") and "intended to have happen," limits the reach and legal effect of the judge's finding/conclusion/characterization that Robinson was "actively involved" in the rape, aiding Pannell by driving him to the victim's home, striking her and knocking her to the floor, enabling Pannell to get on top and rape her. In such a case, Robinson could not be convicted of aiding and abetting the rape, because the judge found that the additional or other offense was beyond the scope of what Robinson "agreed" and "understood" and "intended to have happen."

To be sure, robbery, theft and rape have different elements than murder. But so, too, first-degree murder and second-degree murder have different elements. And second-degree murder is a different offense, with different elements, than assault with intent to inflict great bodily harm less than murder (MCL 750.85).[15]

D

At sentencing the judge said that because Robinson went to the scene with the intent to cause great bodily harm, and the victim "happened to die," Robinson could be found guilty of second-degree murder.[16]

The judge did not recognize that since the death of the victim did not result from injuries inflicted during the physical assault committed by Robinson with the intent to inflict great bodily harm only, Robinson could not be found guilty of second-degree murder because the victim of the physical assault "happened to die." Robinson could properly he convicted of second-degree murder as an aider and abettor only if he provided aid to Pannell in killing the victim with the intent to so aid Pannell in killing the victim, sharing or aware of Pannell's intent to kill.

E

The judge did not specifically address the question whether Robinson intended to assist Pannell in killing the victim when he provided Pannell with the aid the judge found he did provide that assisted Pannell in killing the victim. The judge found, however, that shooting the victim was beyond what Robinson "understood" and "agreed" and "intended to have happen."

Pertinently, the judge found, as above set forth, that as Pannell got the upper hand, Robinson said "back off," "stop, stop it, he's had enough," "turned around and tried to leave," "and then turned around and walked out," and "the evidence actually showed that he left right before Mr. Pannell pulled the gun," and "decided he was going to shoot and kill the person that

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[15] First prong second degree murder has a different element than second prong second degree murder and third prong second degree murder in that to convict of first prong second degree murder there must be a finding that death resulted from an act committed with the intent to kill, while to convict of second prong second degree murder there must be a finding that death resulted from injuries inflicted with the intent to inflict great bodily harm, and to convict of third prong second degree murder there must be a finding that death resulted from wanton and willful conduct likely to cause death.

[16] The judge said:

> The prong for Second-Degree murder is assault with intent to cause great bodily harm. If you go over there with intent and <u>someone happens to die</u>, then you can be found guilty of Second-Degree murder. (Emphasis added.)

Those two sentences of the judge's findings may be found in context in Part I, E, *supra*.

you [Robinson] agreed and understood you were only there to beat up", and "stayed and shot him."

The assistance that Robinson provided in driving Pannell to the victim's home, getting the ball rolling, striking the victim and knocking him to the floor - pursuant to the plan to inflict great bodily harm - found to have enabled Pannell to get on top of the victim and shoot and kill him, were all acts done before Robinson turned around, walked out and left the scene, and, most importantly, before Pannell "pulled the gun" and "decided he was going to shoot and kill" the victim.

F

The judge found that Robinson intended to inflict great bodily harm only. That finding supports only a conviction for assault with intent to commit great bodily harm less than murder, having in mind that

- the victim did not die of injuries inflicted during the physical assault with the intent to inflict great bodily harm only;

- the judge acquitted Robinson of intent to kill second degree murder and of wanton and willful conduct second degree murder;

- the judge found that the shooting was beyond what Robinson "agreed" and "understood" and "had intended to have happen";

- the aid Robinson provided was all provided pursuant to the plan to inflict great bodily harm, and was all provided before Robinson turned around, walked out, and left the scene, and before Pannell pulled the gun and decided that he was going to kill the victim.

Because the cause of death was Pannell's shooting the victim, with an intent that the judge did not find Robinson shared when he engaged in the beating, [17] Robinson's conviction of second-degree murder must be set aside.

The judge said: "I do not find that Mr. Robinson went over there with the intent to kill clearly, and I want to make that perfectly clear on the record. Nor do I believe that Mr. Robinson went over there with the reckless disregard prong."

[17] There is no finding by the judge concerning Robinson's knowledge of Pannell's mental state, and, most particularly, there is no finding that Robinson shared or was aware of Pannell's intent to kill, or of any Pannell intent, other than an implied finding that Robinson was aware of Pannell's intent to inflict great bodily harm, or that Robinson had a particular "malice" other than the intent to inflict great bodily harm only. Injuries inflicted by Pannell with the intent to inflict great bodily harm only were not the cause of death.

Robinson's acquittal of intent to kill and of wanton and willful conduct likely to cause death means that the judge found that the aid that Robinson provided, by driving Pannell to the victim's house and participating in the assault, and knocking him to the floor, was not provided with intent to kill, and did not constitute willful and wanton conduct likely to cause death.

The judge's finding that Robinson intended to inflict great bodily harm only, is, again, tantamount to a finding that when Robinson committed acts pursuant to the plan to inflict great bodily harm, he did not intend thereby to aid Pannell in killing the victim, sharing or knowing of Pannell's intent to kill.

In all events, the judge did not find a necessary element of aider and abettor liability, that when Robinson committed the acts, pursuant to the plan to inflict great bodily harm only, Robinson intended thereby to assist Pannell in killing the victim, sharing or knowing of Pannell's intent to kill.

IV

The possible inference and finding of third prong intent, from knowledge of the principal's first prong intent or second prong intent, is not a mandatory inference. As stated by the Court in *People v Kelley*, 423 Mich 261, 278; 378 NW2d 365 (1985), and *People v Barrera*, 451 Mich 261, 294; 547 NW2d 280 (1996), the alleged aider and abettor's knowledge of the principal's intent to kill or to cause great bodily harm is "sufficient to support a finding of malice" (emphasis added) under the third prong of the three alternative definitions of malice under *Aaron.*[18] Here, the judge drew no such inference, and did not find Robinson guilty under the wanton and willful (third) prong.

The *Kelley/Barrera* formulation does present, however, the issue urged by Robinson, whether malice under the second or third prong of second degree murder is sufficient to support a conviction of aiding and abetting a murder charged as first degree murder or first prong (intent to kill) second degree murder where the finder of fact does not find that the aider and abettor had malice under the first prong – intent to kill – or had knowledge of such an intent of the principal, and death does not result from injuries inflicted with the particular malice found to have been

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[18] In *Barrera*, the Court quoted obiter in *Kelley*:

> Further, if the aider and abettor participates in a crime with knowledge of his principal's intent to kill or to cause great bodily harm, he is acting with "wanton and willful disregard" sufficient to support a finding of malice under *Aaron.*

Knowledge of the principal's intent to kill (first prong) or intent to inflict great bodily harm (second prong) suffices under *Aaron* to support a conviction of second degree murder without regard to whether the trier of fact also infers and finds therefrom – either from a finding of first prong intent or second prong intent -- wanton and willful disregard.

actually possessed by the aider and abettor.

Whether the trier of fact of a person charged as an aider or abettor of first or second degree murder must find, to convict, at least first prong intent to kill second degree murder, or whether it suffices, as we are inclined to think it probably does, that the trier of fact finds that the person charged as an aider and abettor intentionally aided the principal in killing the victim, aware, at the time he provided the assistance, of the principal's intent to kill or sharing that intent, is not determinative in this case because the trier of fact did not find that Robinson possessed any such intent, but, rather, only the intent to inflict great bodily harm, and the victim did not die from injuries inflicted with that intent.

V

We reject Robinson's allegations of improper factual findings by the judge. The judge did not clearly err in finding that Robinson's account, that he was awakened on the night of the victim's murder by Pannell's loud condemnations of the victim, diverged from Brewer's testimony that Pannell had calmed down by the time Robinson awoke. Brewer testified that, by the time Robinson awoke on the night of the victim's murder, Pannell had stopped saying very much and acted as if he was not still angry, and Brewer denied that Pannell's ranting regarding the victim had awakened Robinson.

Any consideration the judge may have given to Pannell's statement incriminating Robinson in his findings concerning Robinson's guilt did not constitute error requiring reversal. This Court has disavowed the rule set forth in *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L d 2d 476 (1968), as applied in the context of a bench trial. *People v Butler*, 193 Mich App 63, 65-66; 483 NW2d 430 (1992).[19] Further, Robinson has not explained how he was prejudiced by the judge's explicit rejection of Pannell's statements incriminating him as a drug dealer.

Robinson's last suggestion, that the judge "relied upon facts not in evidence" by "consider[ing] the facts that the police gave credence to [Robinson] by not charging him with felony firearm and [that] the premeditated murder count was reduced at the preliminary examination," also lacks merit. Robinson cites no authority stating that a judge at a bench trial may not consider the documentation charging the defendant with the crimes at issue. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000).[20] The judge plainly had to consider Robinson's guilt of second-degree murder, the offense charged in the information filed after the preliminary examination. From the fact that Robinson was charged with second-degree murder while Pannell faced charges of first-degree premeditated murder and felony-firearm, the judge reasonably inferred that the police credited Robinson's account that Pannell possessed the gun

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[19] The *Bruton* rule prohibits the introduction of a nontestifying codefendant's confession in a joint jury trial when the codefendant's confession inculpates the defendant. *Butler, supra at* 66 n 1.

[20] Unlike *People v Ramsey*, 385 Mich 221, 224-225; 187 NW2d 887 (1971), cited by Robinson, in this case there is no indication that the judge considered the content of the transcript of the preliminary examination.

and shot the victim. Robinson again has not explained how the judge's observation that the police credited his account of his lesser participation might possibly have adversely affected his right to a fair trial. See MCL 769.26; MCR 2.613(A).

VI

We reverse the conviction of second-degree murder, and reduce the charge of which Robinson was convicted to assault with intent to inflict great bodily harm less than murder (MCL 750.85),[21] and remand for resentencing on that reduced charge.

/s/ William B. Murphy
/s/ Jessica R. Cooper
/s/ Charles L. Levin

[21] This case was tried before *People v Cornell* 466 Mich 335, 367 (2002) was decided.